No. SC92594

IN THE MISSOURI SUPREME COURT

Janet Chochorowski, individually and as the Representative of a class of similarly-Situated persons,

Plaintiff-Appellant,

v.

Home Depot U.S.A., d/b/a The Home Depot,

Defendant-Respondent.

On transfer from the Missouri Court of Appeals, Eastern District, No. ED97339, there on appeal from the Twenty-First Judicial Circuit, St. Louis County, Missouri Circuit Court No. 08SL-CC01183-01

APPELLANT'S SUBSTITUTE REPLY BRIEF

Phillip A. Bock (pro hac vice)
James M. Smith
BOCK & HATCH, LLC
134 N. La Salle St., Ste. 1000
Chicago, IL 60602
(312) 658-5500

Mark L. Brown (Bar# 46153)
SL CHAPMAN LLC
330 North Fourth Street
Suite 330
Saint Louis, MO 63102
(314) 655-7452

Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

INTRODUCTION

Home Depot makes the following arguments in its Respondent's Substitute Brief: (1) 15 CSR 60-8.060 does not apply because Plaintiff signed the Rental Agreement containing a "Damage Waiver"; (2) the Rental Agreement, on its face, gave Plaintiff an option of renting the garden tiller without paying the "Damage Waiver"; (3) any oral misrepresentations made by Home Depot to Plaintiff do not matter because the Rental Agreement controls; and (4) the "Damage Waiver" provided value to Plaintiff if she accidentally damaged her garden tiller. Home Depot is incorrect on each point.

First, Missouri's prohibition of negative options under 15 CSR 60-8.060 focuses on Defendant's conduct, making it immaterial how the Court interprets the "Damage Waiver" of Defendant's rental agreement. It is undisputed that the charge was added to Plaintiff's rental agreement automatically and that Defendant contends it was up to Plaintiff to reject it; the hallmarks of a negative option. Second, the terms of the rental agreement do not give Plaintiff the option of canceling the "Damage Waiver." Third, Home Depot's oral misrepresentations about the "Damage Waiver" show it was reasonable for Plaintiff to believe she had no choice but to pay for it. Fourth, the

"Damage Waiver" provides only an illusory benefit as Home Depot is still free to force its customers to pay to replace a tool that was damaged accidentally. Consequently, this Court should reverse and remand the case to the trial court for further proceedings.

ARGUMENT

A. Defendant's automatic inclusion of a "Damage Waiver" that Plaintiff did not order or solicit in its agreement to rent a garden tiller violated 15 CSR 60-8.060.

Defendant argues it did not violate 15 CSR 60-8.060 because Plaintiff "ordered and solicited" the "Damage Waiver" service by not insisting that Defendant's employees remove the charge from the Rental Agreement. Respondent's Substitute Brief at 18-26. Defendant reaches that conclusion only by ignoring the record and the plain language of 15 CSR 60-8.060, and by relying upon out-of-state cases that do not interpret 15 CSR 60-8.060 or any other statute expressly forbidding negative options in consumer contracts.

Missouri law, 15 CSR 60-8.060, prohibits upselling a service like Defendant's "Damage Waiver" when Plaintiff contacted Defendant to rent a tool. "It is an unfair practice for any seller in connection with the advertisement or sale of merchandise to bill, charge or attempt to

collect payment from consumers, for any merchandise which the consumer has not ordered or solicited." 15 CSR 60-8.060. The record shows that Home Depot leased a garden tiller to Plaintiff. (LF 8-31). During the lease of a garden tiller to Plaintiff, Home Depot upsold Plaintiff a "Damage Waiver." (LF 8-31). Plaintiff did not order the "Damage Waiver" and only agreed to pay for it because Defendant falsely told her she had to. (LF 897, 901, 903). As a result, Defendant violated the MPA because it violated 15 CSR 60-8.060.

Nowhere in the record does it show that Plaintiff went to a Home Depot to purchase a "Damage Waiver." As a result, Defendant's contention that Plaintiff "ordered and solicited" the "Damage Waiver" is limited to the fact that Plaintiff did not seek out the subject improper clause in the Rental Agreement and reject it. That type of negative option practice is exactly what 15 CSR 60-8.060 is to protect against. 15 CSR 60-8.060 is to prevent consumers from being unfairly sold products or services they never intended on ordering or soliciting. Moreover, 15 CSR 60-8.060 does not permit a defendant to place on consumers the burden of finding additional services located in an agreement, which were not ordered, and then objecting to the defendant for trying to sneak an improper negative option past the consumer. To the contrary,

15 CSR 60-8.060 is in place to promote honesty and fair dealing between entities like Home Depot and Plaintiff so that consumers do not have to worry about being upsold services they did not order or solicit from entities like Home Depot.

In further support of its argument, Defendant cites to four out-of-state federal district court decisions in which the same Rental Agreement was at issue: (1) *Rickher v. The Home Depot, Inc.*, No. 05 C 2152, 2007 WL 2317188 (N.D.Ill., July 18, 2007); (2) *Pacholec, Home Depot USA, Inc.*, No. 06 CV 827 PGS, 2006 WL 2792788 (D.N.J., Sept. 26, 2006); (3) *Barnard v. The Home Depot U.S.A., Inc.*, No. A-06-CA-491-LY, 2006 WL 306340 (W.D. Tex., Oct. 27, 2006); and (4) *Cook v. The Home Depot U.S.A., Inc.*, No. 2:06-cv-00571, 2007 WL 710220 (S.D. Ohio, March 6, 2007).

None of those cases, however, assists this Court in determining whether Defendant violated 15 CSR 60-8.060, as none of those cases was filed under the MPA. In *Rickher*, the court noted that plaintiff's negative option argument was limited to "a federal statute [that] bars 'negative option billing' with respect to cable television service and equipment and cites a handful of various state laws (but not Illinois laws) prohibiting negative options in contexts such as

telecommunications services and health insurance." 2007 WL 2317188 at *6. The court further noted, "Plaintiff has failed, however, to point to any statute or common-law doctrine that applies to the instant factual situation…" *Id.*

In *Pacholec*, the plaintiff argued defendant violated the New Jersey Consumer Fraud Act because defendant's sales practices amounted to a negative option. 2006 WL 2792788 at *1-2. However, the district court of New Jersey never ruled on the merits; instead, it held that the plaintiff's complaint lacked the required specificity, and it gave the plaintiff 20 days to file an Amended Complaint. *Id.* at *2.

In *Barnard*, the plaintiff argued, in part, that the defendant participated in "unconscionable practices in violation of Texas Business and Commerce Code § 2A.108." ("Texas UCC"). 2006 WL 3063430 at *1. This plaintiff never argued that the defendant had violated a negative option law similar to Missouri's negative option law; instead, the plaintiff argued that including a negative option in the rental agreement was procedurally unconscionable. *Id.* at *3-4. The court in *Barnard* then looked to Texas case law regarding unconscionability and held the damage waiver was not unconscionably induced. *Id.* at *4.

Finally, in *Cook*, the plaintiff argued, in part, that the automatic

inclusion of the damage waiver rendered the rental agreement "an unconscionable consumer lease under § 1310.06 of the Ohio Code…" 2007 WL 710220 at *5. Like the court in *Barnard*, the court then looked to case law regarding unconscionability to determine the damage waiver was not unconscionable. *Id.* at *6.

B. Defendant did not give Plaintiff the choice of rejecting the "Damage Waiver."

Defendant argues that Plaintiff cannot claim to have been deceived by the Rental Agreement because the Rental Agreement makes clear the "Damage Waiver" is optional, and Plaintiff is bound by the Rental Agreement even though Home Depot lied to her before she paid for her rental. Respondent's Substitute Brief at pp. 29-37. Defendant is wrong.

1. The Rental Agreement does not indicate Plaintiff is a person who had the right to reject the "Damage Waiver."

In its Substitute Brief, Defendant ignores that: (1) Home Depot's computer system was programmed to "pre-load" the damage waiver onto every rental agreement. (LF 908-910); (2) the "damage waiver" fee automatically appears between the "Agreement Subtotal" and the "Sales Tax" without any prior notification from Home Depot, falsely

implying that the "damage waiver" is a "tax" or "fee" that the renter must pay when renting a tool from Home Depot. (LF 343, 908-910); and (3) Plaintiff had to place her initials in a "Special Terms and Conditions" box that contained two other terms and conditions. (LF 343, 887).

Defendant, instead, solely focuses on the "Damage Waiver" clause itself that reads: "I ACCEPT THE BENEFIT OF THE DAMAGE WAIVER (IF APPLICABLE) DESCRIBED IN PARAGRAPH 11 IN THE TERMS AND CONDITIONS OF THIS RENTAL AGREEMENT." In the Appellant's Substitute Brief, Plaintiff explained that "if applicable" is open to an interpretation that means someone other than Plaintiff determines if the "Damage Waiver" applies. For example, it is reasonable to interpret that disclosure to mean that certain tools carry with them a mandatory "Damage Waiver" and certain tools do not; perhaps because certain tools are prone to breaking more than others. It is also reasonable to interpret "if applicable" to mean generally that the applicability of the "Damage Waiver" fee is up to a Home Depot associate after determining how or why the customer is going to rent a tool.

Defendant counters Plaintiff's "if applicable" argument by

suggesting it was enough that Home Depot used the word "if." Respondent's Substitute Brief at pp. 30.("The word 'if' clearly conveys the conditional nature of the damage waiver.") Defendant, however, does not address the ambiguity of what the condition is that makes the "Damage Waiver" apply. Nowhere in the Rental Agreement does it say the "Damage Waiver" applies if Plaintiff wants it, or accepts it, or consents to receiving it. The plain language of the Rental Agreement simply does not explain that the customer is the one who has the right to determine whether the "Damage Waiver" applies. This ambiguity, along with the facts that the "Damage Waiver" was pre-loaded on the Rental Agreement, it appears on the Rental Agreement in a location that makes it seem like a tax, and it is sandwiched between two other terms that cannot be rejected, means that the "Damage Waiver" appeared to be mandatory on the face of the Rental Agreement.

2. Plaintiff was given false information by Defendant that the "Damage Waiver" was mandatory, which induced her to pay for the "Damage Waiver."

Defendant argues that even if Plaintiff was lied to by Home Depot before she paid for the garden tiller, those misrepresentations do not matter because she signed the Rental Agreement anyway. Respondent's

Brief at pp. 31-33. Defendant makes this argument without challenging Plaintiff's citation to *D'Arcy and Assoc., Inc. v. K.P.M.G. Peat Marwick, L.L.P.*, 129 S.W.3d 25, 32 (Mo. App. W.D. 2004) in her Appellant's Substitute Brief for the proposition that: "Although a party must exercise care and prudence for his own welfare, the rule has no application to a case in which the speaker makes a distinct and specific representation to induce action, and that does induce action. That the hearer stands on equal footing with the speaker or has equal knowledge or equal means for obtaining the information is of no consequence."

The record is clear that when Plaintiff first saw the damage waiver on her ride home, she made a note to ask about it when she returned the tiller. (LF 491, 891). When Plaintiff did ask about it, she was told that it was "insurance" and "everyone" was charged. (LF 898-901, 903). Based on Defendant's arguments during this litigation, that statement made by Home Depot to Plaintiff was a false statement. Plaintiff was falsely led to believe that the "Damage Waiver" was a mandatory charge that she had to pay regardless of whether she wanted it. As a result, even if the Court finds that the Rental Agreement should have indicated to Plaintiff that she had the right to cancel the "Damage Waiver," Home Depot's subsequent false

statements show that Plaintiff reasonably believed the "Damage Waiver" was mandatory.

Defendant's contention that the terms of the Rental Agreement are the sole factor that control here is misplaced. Plaintiff is pursuing a an MPA claim, not a breach of contract claim. The purpose of the MPA is "to preserve fundamental honesty, fair play and right dealings in public transactions." *State ex rel. Nixon v. Beer Nuts, Ltd.*, 29 S.W.3d 828, 837 (Mo. App. E.D. 2000). The MPA states that the "act, use or employment by any person of any … unfair practice … in connection with the sale or advertisement of any merchandise … is declared to be an unlawful practice." MO.REV.STAT. § 407.020. "The MPA lacks a precise definition of deceptive practices and was drafted intentionally broad in scope to prevent 'evasion by overly meticulous definitions.'" *State, ex rel. v. Portfolio Recovery Associates, LLC*, 351 S.W.3d 661, 664 (Mo. App. E.D. 2011) *quoting Clement v. St. Charles Nissan, Inc.*, 103 S.W.3d 898, 900 (Mo. App. E.D. 2003). Moreover, "the determination of whether the requirements for fair dealing have been violated turns on the unique facts and circumstances of each case." *Id.* at 665.

As Plaintiff anticipated in her Substitute Brief, Defendant relies upon *Lingo v. Hartford First Ins. Co.*, No. 4:10CV84MLM, 2011 WL

1642223 (E.D. Mo. May 2, 2011) to support its contention that Plaintiff's MPA claim fails because Plaintiff signed the Rental Agreement. Respondent's Substitute Brief at pp. 33-34. However, *Lingo* is distinguishable from this case. The lies told to the plaintiff in *Lingo*, prior to that plaintiff's closing, were by a person named Krupp, who never assisted in fixing the terms of the subject loan. *Id.* at *9. Instead, an entity called St. Louis Home Mortgage ("SLHM") is the entity that fixed the rates of that loan. *Id.* As a result, that court ultimately held that "it cannot be said that SLHM engaged in a practice which is unlawful under the MMPA." *Id.* It is implied from the *Lingo* opinion that if SLHM, rather than Krupp, had told the lies to the plaintiff, then it would not matter what was written on the actual contracts. Such an interpretation would be consistent with *D'Arcy and Assoc., Inc., supra*. Here, Home Depot is the entity who lied to Plaintiff that the "Damage Waiver" was mandatory, executed the agreement with Plaintiff, and benefitted from the misrepresentations.

As a result, even if the Court determines the plain language of the Rental Agreement indicates Plaintiff should have known she had the ability to cancel the "Damage Waiver," the facts show that it was not optional to Plaintiff. In this case, the facts show that Plaintiff did

not want to pay the "Damage Waiver," asked Home Depot about the "Damage Waiver" and Home Depot told her she had no choice. (LF 897-98, 901). Since Plaintiff did have a choice, it is "unfair" and "dishonest" and a violation of the MPA for Home Depot to force Plaintiff to pay for this "optional" service.

C. The rulings in previous actions against Home Depot regarding its automatic "Damage Waiver" did not address Home Depot making misrepresentations as to the "Damage Waiver" to those plaintiffs.

Home Depot contends that Plaintiff's claims in this case are no different from those rejected in other similar cases regarding Home Depot's "Damage Waiver." Respondent's Substitute Brief at p. 37. That is wrong, with respect to Plaintiff's contention that she was lied to prior to finalizing the transaction. As a result, Home Depot's reliance upon the previous actions concerning Home Depot's tool rental practice is misplaced.

Home Depot forced the "Damage Waiver" upon Plaintiff after she inquired about what the "Damage Waiver" meant through false statements. Plaintiff's primary position on this appeal is that the "Damage Waiver" was presented as mandatory through the Rental Agreement. However, Plaintiff's argument does not stop there in that

she also argues Defendant's oral and false representations to Plaintiff induced her to pay for the "Damage Waiver" fee.

The facts of this case show that the circumstances surrounding the Rental Agreement prove that the "Damage Waiver" was not optional, to Plaintiff, no matter how the Court interprets the language of the Rental Agreement. After Plaintiff saw the "Damage Waiver" fee she asked Home Depot about it and was told "everybody" was charged that fee. (LF 897, 901, 903). Plaintiff testified that because she understood from what she was told that "she had no choice," she "had to pay it," and Home Depot "charge[d] everyone," Plaintiff paid the $2.50 "Damage Waiver." (LF 897-98, 901). As a result, if this Court disagrees with Plaintiff's position as to the plain reading of the Rental Agreement, the Court must still look beyond the terms of the Rental Agreement to Home Depot's subsequent demands that the "Damage Waiver" was mandatory. This factual issue was never dealt with by any of the previous ten Home Depot cases.

D. The evidence shows that the "Damage Waiver" provision is worthless as it did not provide Plaintiff with any enforceable rights.

Defendant argues that the "Damage Waiver" fee is not worthless

because it relieves customers of "accidental damage." Respondent's Substitute Brief at pp. 37-41. However, Defendant ignores Plaintiff's citation to the record that show the Damage Waiver fee is a fee to allow the customer the right to negotiate with Home Depot about who has to pay for a damaged tool if the tool breaks while in the possession of the customer. Ultimately, the "Damage Waiver" fee is worthless because it does not give the customer any enforceable rights.

The record shows that Home Depot personnel are given no further instruction on the meaning or coverage of the damage waiver, but they are authorized to interpret and apply it however they see fit. (LF 932). The difference between having the "Damage Waiver" and not having it is that if the customer has it and there is damage, Home depot "is going to work with that customer," but if he does not, Home Depot will not. (LF 932). Thus, it provides no clear coverage but is just a suggestion that Home Depot would potentially be more lenient. (LF 932). This is an illusory contract that leaves unfettered discretion to Home Depot and provides a renter with no discernible or legally enforceable rights. Plaintiff has, thus, plainly shown that she was charged a "disproportionate price for little or no services."

The other cases Defendant cites holding that Home Depot's

"Damage Waiver" actually had value are cases in which the courts did not have the benefit of the clear record in this case demonstrating the illusory nature of the "Damage Waiver."

CONCLUSION

The trial court erred in sustaining Defendant's motion for summary judgment. The evidence shows that Defendant's "Damage Waiver" was a negative option under Missouri rules, was automatically added, and had no value. This Court should reverse and remand this case back to the trial court for further proceedings.

Respectfully submitted,

JANET CHOCHOROWSKI,

By: /s/ Mark L. Brown
One of her attorneys

Phillip A. Bock (pro hac vice)
James M. Smith
BOCK & HATCH, LLC.
134 N. La Salle St., Ste. 1000
Chicago, IL 60602
(312) 658-5500

Mark L. Brown (Bar# 46153)
SL CHAPMAN LLC
330 North Fourth Street
Suite 330
Saint Louis, MO 63102
(314) 655-7452

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the requirements of Rule 84.06 and contains less than 4000 words, as determined by the software application for Microsoft Word.

By: /s/ Mark L. Brown
One of Plaintiff-Appellant's Attorneys

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that, on October 30, 2012, he electronically filed the foregoing brief with the Clerk of the Court of the Supreme Court of Missouri using the ECF system, which will send notification of such filing to the following:

jholstein@polsinelli.com

John C. Holstein
Lauren E. Tucker McCubbin
POLSINELLI SHUGHART P.C.
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, MO 64105
ATTORNEYS FOR RESPONDENT

Russell K. Scott
GREENSFELDER, HEMKER & GALE PC
12 Wolf Creek Drive, Suite 100
Belleville (Swansea), IL 62226
rks@greensfelder.com
ATTORNEY FOR RESPONDENT

shaskins@kslaw.com

S. Stewart Haskins
KING & SPALDING LLP
1180 Peachtree Street N.E.
Atlanta, GA 30309

Jason R. Scheiderer
SNR DENTON US LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111-7700
ATTORNEY FOR AMICUS CURIAE, PACIFIC LEGAL FOUNDATION

By: /s/ Mark L. Brown
One of Plaintiff-Appellant's Attorneys

Phillip A. Bock (pro hac vice)
James M. Smith
BOCK & HATCH, LLC.
134 N. La Salle St., Ste. 1000
Chicago, IL 60602
(312) 658-5500

Mark L. Brown (Bar# 46153)
SL CHAPMAN LLC
330 North Fourth Street
Suite 330
Saint Louis, MO 63102
(314) 655-7452